

Public Prosecutor v Mohammad Terang bin Amit

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO 41-05 OF 1998-II (SG)

MUHAMMAD KAMIL J

28 NOVEMBER 1998

Evidence — Corroboration — Child complainant in sexual offence — Magistrate rejected corroboration by parents — Relied on English authority — Whether magistrate had misdirected himself — Whether English authority applicable in this country — Whether complainants had informed parents at first reasonable opportunity

Evidence — Expert evidence — Who can be an expert witness — Magistrate held medical reports inadmissible — Medical examinations conducted before specialist — Failure to consider evidence of doctors and medical reports — Whether magistrate had erred

Criminal Procedure — Police investigation — First information report — School children — Magistrate failed to consider whether complainants had access to lodging police report — Admissibility of report rejected — Whether complaint made at first reasonable opportunity — Whether magistrate should have admitted first information report

The respondent was discharged and acquitted by the magistrate's court on all three counts of using criminal force to outrage the modesty of PW7, PW8 and PW9. The Public Prosecutor appealed to the High Court, citing three grounds in support, namely: (i) that the magistrate had erred in holding that there was no corroboration in respect of the evidence of PW7, PW8 and PW9; (ii) that the magistrate had erred in holding that the three medical reports of PW7, PW8 and PW9 were not admissible; and (iii) that the magistrate had erred in law in holding that allegations against the accused was either totally or substantially untrue by virtue of the fact that the complaints were not lodged at the first reasonable opportunity. The magistrate had rejected the evidence of PW10, PW11 and PW12, the parents of PW7, PW8 and PW9, and also the evidence of PW15, a teacher at the same school.

Held, confirming the order of discharge and acquittal on the first and second charge and ordering the respondent to enter his defence on the third charge:

- (1) In rejecting the evidence of PW10, PW11 and PW12, the magistrate relied on the English case of *R v Job Whitehead* [1929] 1 KB 99, which could not be said to represent the correct statement of the law applicable in our country. As such, the magistrate must have misdirected himself when he rejected the evidence by merely relying on the authority of that case (see pp 159I and 160A); *R v Job Whitehead* [1929] 1 KB 99 not followed.
- (2) In view of the delay by PW7 and PW8 in informing their mothers of the alleged incidents, it could not be said that they had informed their mothers upon the 'first reasonable opportunity' or 'as speedily as could reasonably be expected'. Therefore, their

- A** evidence must be precluded as capable of corroborating the evidence of PW7 and PW8. However, PW15 was only transferred to the said school in August 1997 and informed by PW7 about the respondent in October 1997. Therefore, whatever complaints lodged with PW15 were made as speedily as could reasonably be expected of them under the circumstances of the case (see pp 160G, I and 161A).
- B**
- C** (3) Since the evidence sought to be adduced by the prosecution through the three doctors concerned the physical examinations of PW7, PW8 and PW9, there was no reason whatsoever to reject their findings on such a simple matter. All the examinations were conducted in the presence of PW4, who was a specialist and head of the Obstetrics and Gynaecology Department of the Sarawak General Hospital. The magistrate was clearly wrong when he failed to consider the evidence of the three doctors and PW4, together with the medical reports (see pp 162I and 163A–B).
- D** (4) The magistrate failed to consider that the complainants were all school children who resided in the hostel of the school. The magistrate should also have considered whether they would have had the opportunity or access to lodge the police report or whether they possessed the idea and know-how to lodge a police report, before rejecting the admissibility of the police report. Even if the first information report was only of corroborative value and not substantive evidence, the magistrate should have admitted it under s 108A of the Criminal Procedure Code (FMS Cap 6) (see pp 163I and 164A, C–E).
- E**

F [Bahasa Malaysia summary]

Penentang telah dilepaskan dan dibebaskan oleh mahkamah majistret ke atas ketiga-tiga kesalahan menggunakan kekerasan untuk mencabul kehormatan PW7, PW8 dan PW9. Pendakwa Raya telah merayu kepada Mahkamah Tinggi dengan memberi tiga alasan sokongan, iaitu: (i) bahawa majistret tersebut telah tersilap dengan memutuskan bahawa tidak terdapat sokongan terhadap keterangan PW7, PW8 dan PW9; (ii) bahawa majistret tersebut telah tersilap apabila memutuskan bahawa ketiga-tiga laporan perubatan PW7, PW8 dan PW9 tidak boleh diterima; dan (iii) bahawa majistret tersebut telah tersilap di dalam undang-undang apabila memutuskan bahawa tuduhan-tuduhan terhadap tertuduh adalah sebahagiannya atau sepenuhnya tidak benar disebabkan aduan-aduan tidak dilaporkan pada peluang pertama yang munasabah. Majistret tersebut telah menolak keterangan PW10, PW11 dan PW12, ibubapa-ibubapa PW7, PW8 dan PW9, dan juga keterangan PW15, seorang guru di sekolah yang sama.

G

H

I **Diputuskan**, mengesahkan perintah pelepasan dan pembebasan ke atas tuduhan pertama dan kedua dan memerintah penentang untuk mencatat pembelaannya ke atas tuduhan ketiga:

- (1) Dalam menolak keterangan PW10, PW11 dan PW12, majistret tersebut bergantung kepada kes Inggeris *R v Job Whitehead* [1929] 1 KB 99, yang tidak boleh dikatakan mewakili pernyataan betul undang-undang yang dapat dikenakan di dalam negara kita. Oleh itu, majistret tersebut mesti telah salah arah dirinya apabila dia menolak keterangan tersebut bergantung hanya pada autoriti kes tersebut (lihat ms 159I dan 160A; *R v Job Whitehead* [1929] 1 KB 99 tidak diikuti. A
B
- (2) Memandangkan tangguhan oleh PW7 dan PW8 dalam memberitahu ibu-ibu mereka mengenai kejadian yang dikata, ia tidak boleh dikatakan bahawa mereka telah memberitahu ibu-ibu mereka dalam 'peluang pertama yang munasabah' atau 'secepat mana yang boleh dijangka'. Oleh kerana itu, keterangan mereka mesti dikecualikan daripada berkebolehan menyokong keterangan PW7 and PW8. Walau bagaimanapun, PW15 hanya dipindahkan ke sekolah tersebut pada Ogos 1997 dan diberitahu oleh PW7 mengenai penentang pada Oktober 1997. Oleh itu, sebarang aduan yang dibuat kepada PW15 telah dibuat mereka secepat mana yang boleh dijangka di bawah keadaan-keadaan kes tersebut (lihat ms 160G, I dan 161A). C
D
- (3) Memandangkan keterangan yang hendak diketengahkan oleh pihak pendakwa melalui tiga orang doktor adalah berkenaan dengan pemeriksaan-pemeriksaan fizikal PW7, PW8 dan PW9, tidak ada sebab langsung untuk menolak pendapat mereka terhadap sesuatu perkara yang mudah. Kesemua pemeriksaan-pemeriksaan telah dilakukan di dalam kehadiran PW4, seorang pakar dan ketua Jabatan Obstetrik dan Ginekologi Hospital Besar Sarawak. Majistret tersebut jelasnya salah apabila dia gagal mempertimbangkan keterangan-keterangan ketiga-tiga doktor tersebut dan PW4, dengan laporan-laporan perubatan tersebut (lihat ms 162I dan 163A-B). E
F
- (4) Majistret tersebut telah gagal mempertimbangkan bahawa pengadu-pengadu kesemuanya adalah kanak-kanak sekolah yang tinggal di asrama. Majistret tersebut juga sepatutnya mempertimbangkan sama ada mereka mempunyai peluang atau tidak untuk membuat laporan polis atau sama ada mereka mempunyai pengetahuan bagaimana untuk membuat laporan polis, sebelum menolak kebolehterimaan laporan polis tersebut. Walaupun laporan maklumat pertama hanya mempunyai nilai sokongan dan bukanlah keterangan substantif, majistret tersebut sepatutnya menerimanya masuk di bawah s 108A Kanun Acara Jenayah (NMB Bab 6) (lihat ms 163I dan 164A, C-E).] G
H

Notes

For a case on corroboration of a child complainant in sexual offence, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 557. I

- A** For a case on who can be an expert witness, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 960.
For cases on first information report, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1877–1880.

B Cases referred to

Director of Public Prosecutions v Hester [1972] 3 All ER 1056 (refd)
Junaidi bin Abdullah v PP [1993] 3 MLJ 217 (refd)
Lim Baba v PP [1962] MLJ 201 (refd)
Lt Kol Yusof bin Abdul Rahman v Kol Anuar bin Mat Amin [1997]

- C** 1 MLJ 562 (refd)
PP v Ismail bin Atan [1992] 2 CLJ 1253 (refd)
PP v Ong Cheng Heong [1998] 6 MLJ 678 (refd)
PP v Teo Eng Chan & Ors [1988] 1 MLJ 156 (refd)
R v Cummings [1948] 1 All ER 551 (refd)
R v Job Whitehead [1929] 1 KB 99 (not folld)
- D** *Syed Abu Tahir all Mohamed Esmail v PP* [1988] 3 MLJ 485 (refd)
Tan Cheng Kooi & Anor v PP [1972] 2 MLJ 115 (refd)
Wong Chop Saow v PP [1965] 1 MLJ 247 (refd)

Legislation referred to

- E** Child and Young Persons Act 1933 (UK) s 38
Criminal Procedure Code (FMS Cap 6) ss 108A, 180, 182A
Evidence Act 1950 ss 8(1), (2), 45, 133A, 157,
Evidence Act (Sing) s 159
Penal Code (FMS Cap 45) s 354
- F** *Marutin Pagan* (Deputy Public Prosecutor) for the appellant.
John Shek (John Shek & Co) for the respondents.

Muhammad Kamil J: The respondent, Mohammad Terang bin Amit, was charged with three counts of using criminal force to outrage the modesty of PW7, PW8 and PW9 contrary to s 354 of the Penal Code (FMS Cap 45).

- G** The three charges were tried jointly at the same trial and at the end of the case for the prosecution, the learned magistrate discharged and acquitted the respondent of all the said charges.

- H** Being dissatisfied with the decision of the learned magistrate, the Public Prosecutor appealed to the High Court, citing three grounds in support thereto.

- I** In the first ground of appeal, it was alleged that the learned magistrate erred in holding that there was no corroboration in respect of the evidence of PW7, PW8 and PW9. The other two grounds which concerned the admissibility of the medical and police reports have relation with the issue of corroboration and therefore are pertinent to the first ground of appeal as well.

Briefly, the respondent was a teacher at the school attended by PW7, PW8 and PW9. At the time of the alleged commission of the offences, PW9 was only 10 years old and PW8 and PW7 were both 12 years old. All the alleged incidents were said to have happened at about 11pm inside the hostel known as 'Asrama Puteri', where the three girls were putting up together with some of the female students from the school.

Coming back to the first ground of the appeal herein, it was decided by the learned magistrate that the unsworn evidence or the evidence given not under oath by PW7, PW8 and PW9 at the trial could not be relied upon to corroborate each other. In addition thereto, the learned magistrate also held that the evidence of another two students, PW13 and PW14, given also not under oath, could not be used to support the evidence of PW7, PW8 and PW9.

It is not only a prudent practice but also a statutory requirement in the form of s 133A of the Evidence Act 1950 ('the Act') that in order to support the case of the prosecution against the accused person, the unsworn evidence of a child must be corroborated by some other material evidence. Section 133A of the Act provides that:

Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code of the Federated Malay States shall be deemed to be a deposition within the meaning of that section:

Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

It is pertinent to note that the provisions of s 133A of the Act are in fact derived from s 38 of the Children and Young Persons Act 1933 of England. In this regard, the learned magistrate clearly demonstrated the correct application of the law in citing *Director of Public Prosecutions v Hester* [1972] 3 All ER 1056, where Lord Pearson after having recited the relevant part of s 38 of the Children and Young Persons Act 1933 went on to state that (at p 1069):

The proviso contains the only statutory disqualification of unsworn evidence differentiating its effect from that of other evidence. An accused person is not to be convicted on unsworn evidence unless it is corroborated by some other material evidence in support thereof implicating the accused. The disqualification applies to all the unsworn evidence given in a particular case; if there are two or more children giving unsworn evidence to the same effect, still there can be no conviction unless there is some other evidence corroborating their evidence.

A The abovesaid explanation inexplicably affirmed the findings of the learned magistrate that the unsworn evidence of PW7, PW8 and PW9, taken individually, could not be used to corroborate the unsworn evidence of the other two witnesses. The unsworn evidence of another two female students, PW13 and PW14, could not be relied upon as well to corroborate the evidence of either PW7, PW8 and PW9.

B In dealing with the evidence of PW10, PW11 and PW12, all of whom are the parents of PW7, PW8 and PW9, the learned magistrate was of the view that their evidence could not be used to corroborate the evidence of PW7, PW8 and PW9 as the events as related by PW10, PW11 and PW12, in particular PW10 and PW11, at the trial, were told to them by their
C respective daughters. On similar ground, the learned magistrate also did not accept the evidence of PW15, another teacher at the same school, as being capable of corroborating the evidence of PW7, PW8 and PW9. In support thereto, the learned magistrate referred to the case of *R v Job Whitehead* [1929] 1 KB 99, where Lord Hewart CJ in delivering the judgment of the Court of Criminal Appeal held that (at p 102):

D Any such inference as to what the girl had told her mother could not amount to corroboration of the girl's story, because it proceeded from the girl herself, it was merely the girl's story at second hand. In order that evidence may amount to corroboration, it must be extraneous to the witness who is to be corroborated.

E However, in the case of *Lim Baba v PP* [1962] MLJ 201 where the above case of *R v Job Whitehead* was discussed, his Lordship Ismail Khan J (as he then was) said (at p 202):

F It was also contended that the learned president had misdirected himself in accepting as corroboration the complaint by PW3 shortly after the alleged occurrence of the facts complained of. I fail to see any misdirection having regard to s 157 of our Evidence Ordinance 1950 which reads:

G 'In order to corroborate the testimony of a witness, any former statement made by such witness, whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the same time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.'

H It is true that in an English case *R v Job Whitehead*, it was held that a witness cannot corroborate himself. The question of the admissibility of such an immediate complaint was dealt with in the case of *R v Velayuthan* [1935] MLJ 277, a Singapore case. In that case, Whitley J referred to s 157 of the Ordinance No 53 (Evidence) (now s 158 of Cap 13 SS) which is identical with s 157 of our Evidence Ordinance. He said that this section has no counterpart in the English law of evidence and therefore, a complaint if made immediately would be treated as corroboration, although in England it would not be so regarded. Its value and strength as corroboration must depend in every case upon the circumstances under which it is made.

I Having regard to the abovesaid principles as enunciated by the learned judge therein, it is abundantly clear that *Whitehead's* case could not be said

to represent the correct statement of the law applicable in our country. As such, the learned magistrate must have misdirected himself when he rejected outright the evidence of PW10, PW11, PW12 and PW15 by merely relying on the authority of that case. Be that as it may, it still prevails upon this court to scrutinize the evidence of PW10, PW11, PW12 and PW15 in order to determine whether their evidence can be treated as corroborative evidence.

In her evidence, PW10, who is the mother of PW8, informed the court that her daughter told her sometime in the month of February 1998, that the respondent touched her breast and also kissed and touched her private part. PW11, the mother of PW7, testified that her daughter informed her four days before Hari Raya Puasa this year that the respondent opened PW7's trousers while she was sleeping and inserted his finger into her vagina. As for PW12, who is the father of PW9, he merely testified that he accompanied his daughter to lodge a police report at the Sri Aman Police Station.

Thus, the crucial question to be considered is whether the evidence of PW10 and PW11 in particular, can be admitted by virtue of s 157 of the Act. In the Singapore case of *PP v Teo Eng Chan & Ors* [1988] 1 MLJ 156, the words 'at or about the time the fact took place' in s 159 of the Evidence Act of Singapore which is similar to s 157 of our Evidence Act was discussed and Coomaraswamy J held that (at p 161):

Our law is contained in s 159 of the Evidence Act which provides that a witness' testimony may be corroborated by any former statement made by such witness '... relating to the same fact at or about the time the fact took place or before any legal authority competent to investigate the fact'. The expression 'at or about the time the fact took place' is not to be limited in terms of hours or days. It is limited by the terms 'first reasonable opportunity' or 'as speedily as could reasonably be expected'.

Further, s 159 must be read with s 8(2), explanation 1 and illustrations (j) and (k) to that section.

In view of the abovesaid explanations and the conspicuous delay by PW7 and PW8 to inform their mothers of the alleged incidents, it could not be gainsaid that they had upon the 'first reasonable opportunity' or 'as speedily as could reasonably be expected' of them to inform their mothers; their evidence, therefore, must be precluded as capable of corroborating the evidence of PW7 and PW8.

On the other hand, the evidence of PW15 suffered from no such infirmity. According to PW15, he was informed by PW7 and another female student in October 1997 that the respondent had disturbed them while they were sleeping. It was revealed that the respondent opened their trousers and inserted his finger into their private parts and also fondled their breasts. It must be remembered that in two of the charges herein, the alleged incidents were said to have occurred between the month of January and November 1997. Furthermore, PW15 was only transferred to the said school in August 1997. From the evidence adduced, it is clear that whatever complaints lodged by PW7 and another female student with PW15 were made as

A speedily as could reasonably be expected of them under the circumstances of the case.

In any event, the complaint lodged by PW7 with PW15 is also relevant by virtue of s 8(2), explanations 1 and 2, and illustrations (j) and (k) of the Act as remarked in the case of *PP v Teo Eng Chan & Ors*. The relevant parts of s 8 together with the explanations and illustrations are as follows:

B (1) Any fact is relevant which allows or constitutes a motive or preparation for any fact in issue or relevant fact.

C (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

D Explanation 1 — The word ‘conduct’ in this section does not include statements unless those statements accompany and explain acts other than statements; but this explanation is not in affect the relevancy of statements under any other section of this Act.

Explanation 2 — When the conduct of any person is relevant any statement made to him or in his presence and hearing which affects his conduct is relevant.

Illustrations

E (j) The question is whether A was ravished.

The facts that shortly after the alleged rape she made a complaint relating to the crime, the circumstances under which and the terms in which the complaint was made are relevant.

F The fact that without making a complaint she said that she had been ravished is not relevant as conduct under this section, though it may be relevant —

- (i) as dying declaration under section 32(a); or
- (i) as corroborative evidence under section 157.

(k) The question is whether A was robbed.

G The fact that soon after the alleged robbery he made a complaint relating to the offence, the circumstances under which and the terms in which the complaint was made are relevant.

The fact that he said that he had been robbed without making any complaint is not relevant as conduct under this section, though it may be relevant —

- H**
- (i) as a dying declaration under section 32(a); or
 - (ii) as corroborative evidence under section 157.

From the above two illustrations, either way, the evidence of PW15 taken on its own may be considered as a piece of substantive evidence or be treated as corroborative evidence under s 157.

I As for the second ground of this appeal concerning the admissibility of the three medical reports of PW7, PW8 and PW9, the learned magistrate

ruled that they were not admissible since the suggestions by Hashim J as to how expert witness should give his evidence in the case of *Wong Chop Saow v PP* [1965] 1 MLJ 247 had not been strictly complied with in our instant case. His Lordship in that case suggested that (at p 247):

May I, with respect, suggest that to avoid confusion the expert witness should give his evidence as follows. He should first state his qualifications as an expert. He should then state that he has given evidence as an expert in such cases and that his evidence has been accepted by the courts. He should then proceed to describe the various documents and give his reasons why in his opinion they relate to characters lottery. The trial magistrate must then come to a finding that he either accepts or rejects the evidence of the expert witness vis-a-vis characters lottery.

It must be pointed out that the abovesaid suggestions, if they are to be followed strictly, are too inhibitive as to exclude the evidence of even an eminent expert if he has not given any evidence in court before. The Supreme Court in the case of *Junaidi bin Abdullah v PP* [1993] 3 MLJ 217 laid down a much more comprehensive and equitable approach for the reception of expert opinions under s 45 of the Act. In delivering the judgment of the Supreme Court, his Lordship Mohd Azmi SCJ held that (at p 229):

In our view, the test to be applied for the purpose of s 45 of the Evidence Act 1950 is this. First, does the nature of the evidence require special skill? Second, if so, has the witness acquired the necessary skill either by academic qualification or experience so that he has adequate knowledge to express an opinion on the matter under enquiry? The answer to both questions must necessarily depend on the facts of each particular case. The speciality of the skill required of an expert witness under s 45 would depend on the scientific nature and complexity of the evidence sought to be proved. The more scientific and complex the subject matter, the more extensive and deeper will the court be required to enquire into the ascertainment of his qualification or experience in the particular field of art, trade or profession. But in the final analysis in a non-jury trial, it is for the trial judge himself as both judge of fact and law to determine the weight to be attached to such evidence notwithstanding the outstanding qualification or experience (or the lack of it) of the expert. To use the words of Suffian LP at p 323 in *PP v Muhamed bin Sulaiman* [1982] 2 MLJ 320 when he applied the case of *PP v Virammal* AIR 1923 Mad 178, the jurors themselves 'could have used a magnifying glass, or their own eyes and their own mind to the evidence and [verify] the results submitted to them' by the expert witness. *The lack of qualification or experience on the part of the expert must necessarily affect the weight of the evidence rather than admissibility. But where the evidence is of a complex and scientific nature, the absence of both qualification or experience can certainly affect admissibility. No hard and fast rule should be laid down on the issue of the competency of an expert witness.* (Emphasis added.)

Since the evidence sought to be adduced by the prosecution through the three doctors, PW1, PW2 and PW3, concerned the physical examinations of PW7, PW8 and PW9 and their respective private parts, there is no reason whatsoever to reject their findings on such a simple and straightforward matter. It must be remembered that all the examinations were conducted in

A the presence of PW4. PW4 graduated as a medical doctor in 1985. He was a specialist and head of the Obstetrics and Gynaecology Department, Sarawak General Hospital at the time when PW7, PW8 and PW9 were examined by PW1, PW2 and PW3. In the course of the examinations, it was found that only the hymen of PW7 was torn. Apart from this, there was no evidence of other physical injuries on either PW7, PW8 or PW9. In the result, the learned magistrate was clearly wrong when he failed to consider the evidence of PW1, PW2, PW3 and PW4 together with the medical reports P1, P2 and P3. Nevertheless, the only piece of evidence which may assist the prosecution is P1, the medical report of PW7, which revealed that the hymen of PW7 was torn at one o'clock, six o'clock and eleven o'clock positions. In *Syed Abu Tahir a/l Mohamed Esmail v PP* [1988] 3 MLJ 485, Zakaria Yatim J (as he then was) after having considered the evidence of the doctors who examined the complainant and the accused in a kidnapping cum rape case held at p 488:

D In my opinion the evidence of the girl was sufficiently corroborated by the two doctors who examined the girl and the appellant respectively. In a case of this nature, medical evidence is sufficient to corroborate the evidence of the girl: see Ratanlal & Dhirajlal, *The Law of Crimes* (22nd Ed), at p 965.

E According to the evidence of PW7, there were many occasions where the respondent entered the hostel where she was staying at night at about 11pm. On each occasion, the respondent would touch her breast and insert his finger into her private part. Evidently, the medical report of PW7 should be capable of corroborating the evidence of PW7.

F Finally, on the issue of the police reports lodged by PW7, PW8 and PW9, the learned magistrate noted that he was entitled and even encouraged to infer that the complainants' allegations against the accused was either totally or substantially untrue 'by virtue of the facts that the complaints were not lodged at the first reasonable opportunity'. The complaint made at the first reasonable opportunity depends on the circumstances in each case. In *R v Cummings* [1948] 1 All ER 551, Lord Goddard CJ said:

G It is objected that she did not make a complaint immediately, and, therefore, that evidence of the fact that she made a complaint ought not to have been admitted. The law on the subject was laid down once and for all in *R v Lillyman* [1896] 2 QB 167 which reviewed all the authorities. Hawkin J, in delivering the judgment of the Court of Crown Cases Reserved, in that case, said:

H 'It is too late, therefore, now to make serious objection to the admissibility of evidence of the fact that a complaint was made, provided it was made as speedily after the acts complained of as could reasonably be expected.'

I However, the learned magistrate failed to consider that the complainants were all school children who resided at the hostel of the school they were studying. PW7 was 12 years old at the time of the incident and so was PW8. PW9 was even younger then, she was only 10 years old. In reality, would they have the opportunity or access to lodge the police reports? More importantly, did they possess the idea and know-how to lodge a police

report in view of their tender age? These are factors which the learned magistrate should have considered before rejecting the admissibility of the police reports. In addition, the police reports lodged by PW7, PW8 and PW9 can be admitted by virtue of s 108A of the Criminal Procedure Code (FMS Cap 6) ('the CPC') which provides that: **A**

In any proceeding under this Code a copy of an entry relating to an information reduced to writing under the provisions of section 107 or of section 108, and purporting to be certified to be a true copy by the Officer in Charge of the Police District in which the police station where the information given is situated, shall be admitted as evidence of the contents of the original and of the time, place and manner in which the information was so recorded. **B**

Such a report which generally have been accepted and known as a first information report can never be considered as a piece of substantive evidence to prove a fact. At the most, it is only of corroborative value (see *Tan Cheng Kooi & Anor v PP* [1972] 2 MLJ 115). In *PP v Ismail bin Atan* [1992] 2 CLJ 1253, James Foong JC (as he then was) held that (at p 1256): **C**

In this case, the first information report was the information PW3 received from his source. If this report is tendered it can be admitted under s 108A of the Criminal Procedure Code. In fact, if the information is reduced to writing, it will be of considerable value to this trial since its material can be compared with subsequent materials derived from such investigation. This would enable the court to evaluate these evidence in order to come to a just decision. **D**

Indeed, the police reports P6, P7 and P8 should have been admitted by the learned magistrate under s 108A of the CPC. Nevertheless, it must be emphasized that the evidence so admitted was not meant to show the truth of the allegations as contained therein but to underline the consistency of the stories. **E**

Upon the foregoing reasons and upon a careful scrutiny of the evidence deemed admissible, this court is of the view that a prima facie case has been made out against the respondent only in respect of the third charge. In the final analysis and upon a maximum evaluation of all the evidence adduced herein, it is clear that the evidence of PW7, the alleged victim in the third charge, was amply corroborated by the evidence of PW15, P1 and P6 as well. **F**

In the result, this case is hereby ordered to be remitted to the magistrate's court at Sri Aman for the learned magistrate to call upon the respondent to enter his defence on the third charge herein. The order of discharge and acquittal of the respondent in respect of the first and second charge is hereby confirmed. **G**

Though it is not a ground of appeal, I should mention here, in order to avoid any misunderstanding, that the degree of proof required of the prosecution's case at the close of the case for the prosecution is prima facie proof. Learned counsel for the respondent, Mr John Shek, submitted that 'the degree of proof required to establish (at the end of the prosecution's case) a prima facie case is beyond reasonable doubt.' The quotation is gleaned from the headnote 'Held (3)' in the Court of Appeal case of *Li Kol* **H**

I

A *Yusof bin Abdul Rahman v Kol Anuar bin Mat Amin & Anor* [1997] 1 MLJ 562. But it is clear that this case is a decision made prior to the Amendment Act A979, ie before the Amendment Act A979 was gazetted. This quotation is not the ratio decidendi of the case; apparently, it is a mere obiter dictum.

B The new ss 180 and 182A in Act A979 are for convenience reproduced as follows:

Section 180:

- C**
- (i) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.
 - (ii) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.
 - (iii) If the Court finds a prima facie case has been made out against the accused on the defence charged the Court shall call upon the accused to enter on his defence.

D Section 182A:

- E**
- (i) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
 - (ii) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted thereon.
 - (iii) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

F It is noted that s 180 of the Act deals with the degree of proof required at the end of the case for the prosecution. Section 182A of the Act is quite different, it deals with the degree of proof required at the conclusion of the trial. It follows, obviously, that there are two degrees of proof at two different stages, ie a prima facie proof and a proof beyond reasonable doubt. The two cannot be the same.

G The proof of a prima facie case under s 180 of the Act is succinctly explained in *PP v Ong Cheng Heong* [1998] 6 MLJ 678 by Vincent Ng J at p 691 that:

H 'Prima facie' means on the face of it or at first glance. To me, in the light of Act A979, ... definition of a 'prima facie case' could be found in the *Oxford Companion of Law* (p 987), which has it as: 'A case which is sufficient to call for an answer. While prima facie evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive.'

As to the 'prima facie case' as enunciated in *Lt Kol Yusof bin Abdul Rahman's* case, the learned judge had this to say (at p 690):

I ... I found myself unable to agree with its rationale for deciding that the degree of proof to establish a prima facie case is proof beyond all reasonable doubt.

... I also find that it is not an authoritative judicial precedent which is binding and must be followed under the principle of stare decisis, as the dicta therein on what constitutes 'prima facie' was an obiter dictum rather than ratio decidendi.

I can do no better than what has been said by the learned judge, and I would not hesitate to express my concurrence thereto.

Order of discharge and acquittal on the first and second charge confirmed. Respondent to enter defence on third charge.

Reported by Mohd Rizal Abidin

A

B

C

D

E

F

G

H

I